FOR ARGUMENT

Supreme Court, U. S.
FILED
APR 14 1978
MICHAEL RODAK, JR., CLERK

No. 77-380

In the Supreme Court of the United States

OCTOBER TERM, 1977

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, PETITIONER

v.

CHARLESTONE STONE PRODUCTS CO., INC.,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-380

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, PETITIONER

v.

CHARLESTONE STONE PRODUCTS CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

---

1. Respondent recognizes that both the mining law of 1872[1] and the Desert Land Act of 1877[2] give federal sanction to private water rights acquired under state law (Br. 16-17). Respondent contends that these provisions were not intended to be exclusive, but that "[w]ater rights may be acquired under either federal mining law or state law and a claim perfected under either must be respected and recognized by future claimants under both systems" (Br. 21).

Respondent acknowledges that this analysis of the statutory provisions regarding water rights enacted in the mining laws of 1866 and 1870 and now codified in 30

---

[1]17 Stat. 91, as amended, 30 U.S.C. 22 *et seq.*

[2]19 Stat. 377, as amended, 43 U.S.C. 321.

U.S.C. 51 and 52 is inconsistent with this Court's analysis of those provisions in *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142.[3] Accordingly, respondent dismisses the Court's discussion in that case as *dictum*, since "[n]either party in *Beaver Portland Cement* was making any claim to water rights on the basis of * * * [the] mining laws" (Br. 16). It is not suprising that neither party was making such a claim. As noted in our opening brief (at 28-31), early administrative decisions had made it clear that the provisions in the mining laws sanctioning private water rights under state law were exclusive and that water was not subject to location under the mining laws. *Pagosa Springs*, 1 L.D. 562 (rev. ed); *William A. Chessman*, 2 L.D. 774, 775; *Charles Lennig*, 5 L.D. 190, 191.[4] The Court in *Beaver Portland Cement*, however, looked to the purpose and effect of the mining law provisions regarding the acquisition of private water rights on public lands to guide its construction of the Desert Land Act, and it read the Desert Land Act and the mining laws as evincing a common intent to sanction state law as the "test and measure of private rights" to water. The Court's discussion of the mining laws therefore was not *dictum*.

---

[3]The Court concluded (295 U.S. at 155):

> The effect of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain.

[4]Respondent urges that because the earliest of these administrative decisions, *Pagosa Springs*, was handed down in 1882, ten years after the enactment of the mining law of 1872, it was not contemporaneous. However, 1882 was the first year the Department of the Interior compiled and indexed its formal opinions.

Respondent ignores the central fact that over the more than 100 years since the inception of the mining laws, not a single administrative or judicial decision supports the contention that those laws were intended to serve as an alternative to state law as a method of acquiring water rights.[5] To the contrary, in many early cases involving claims to water for use in connection with mining claims, the courts recognized that any water rights must be acquired under state law. *E.g.*, *Campbell* v. *Goldfield Consol. Water Co.*, 36 Nev. 458, 136 Pac. 976; *McFarland* v. *Alaska Perseverance Mining Co.*, 3 Alaska 308, 327-332; *Snyder* v. *Colorado Gold Dredging Co.*, 181 Fed. 62, 67-69 (C.A. 8); *Thorndyke* v. *Alaska Perserverance Mining Co.*, 164 Fed. 657 (C.A. 9); see *Telluride Power Transmission Co.* v. *Rio Grande Western Ry. Co.*, 175 U.S. 639, 647.

2. The unprecedented nature of the conclusion reached by the court of appeals in this case is suggested in the following analysis of the court's opinion by Dean Trelease (described by respondent (Br. 8 n. 1) as "a noted contemporary authority on water law"):

> Ignoring the trial court, the briefs and the arguments, that court found that H_2O is chemically and legally a valuable mineral and that the discovery of water on a placer claim validates that claim under the Mining Law of 1872. *Charlestone Products Co.* v. *Andrus*, 553 F. 2d 1209 (9th Cir. 1977). If this were

---

[5]Respondent relies on *United States* v. *Union Oil Co.*, 549 F. 2d 1271 (C.A. 9), certiorari denied *sub nom. Ottoboni* v. *United States*, No. 76-1796, October 31, 1977, rehearing denied February 27, 1978, as authority for the proposition that water is a mineral (Br. 13). As discussed in detail in our brief in opposition to the petition for rehearing, the Ninth Circuit in that case did not consider the question whether water was a locatable mineral, but rather whether Congress intended the reservation of "coal and other minerals" to reserve geothermal resources.

so, mining claims in gravel placers could revive long abandoned common law rules of ground water ownership and capture, and claims on outcropping sandstone and limestone aquifers could raise horrendous problems of priority and extralateral rights. The case cannot be taken seriously however. One of three explanations must be accepted: (1) the court collectively went stark raving mad and by pushing logic to an illogical extreme it reversed 100 years of history and wrecked the state administration of ground water wherever federal lands or retained minerals can be found, (2) the court seized on a seemingly attractive rule to give the mining company legal access to its valuable well on public land, without analyzing the consequences for other cases, or (3) the court is poking fun at and pointing out the inadequacies of the old mining law in order to hasten its demise.

Water Acquisition for Mineral Development Institute, Trelease, "Federal-State Problems in Packaging Water Rights," at 9-17 n. 47 (Rocky Mt. Min. L. Fdn., 1978).

3. Respondent suggests (Br. 21-28) that this Court's recognition of the doctrine of reserved water rights and of other limitations on state authority to restrict the federal government's water rights (*e.g., Federal Power Commission* v. *Oregon*, 349 U.S. 435; *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275) is inconsistent with the position of the government in this case. That position, according to respondent, is that "the states have been given exclusive control of water rights" (Br. 24). We take no such position. We adhere to the reserved rights doctrine, the cases under the Reclamation Act of 1902 (32 Stat. 390, 43 U.S.C. 383), and the cases under the Federal Water Power Act (41 Stat. 1077, 16 U.S.C. 821)—all of

which deal with the water rights of the federal government, not with the acquisition of water rights by private individuals. Our contention here is only, as this Court stated in *California Oregon Power Co.* v. *Beaver Portland Cement Co., supra*, 295 U.S. at 155 (emphasis added), that state and local laws are "the test and measure of *private rights* in and to the non-navigable waters on the public domain."

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1978.